Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 509.

SAUL M. NECTOW,
PLAINTIFF IN ERROR,
v.
CITY OF CAMBRIDGE AND JEREMIAH F. DOWNEY, INSPECTOR OF BUILDINGS OF THE CITY OF CAMBRIDGE.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

RESPONDENTS' BRIEF.

STATEMENT OF THE CASE.

This is a bill filed the 31st day of December, 1924, for a mandatory injunction to direct the defendant city and its Inspector of Buildings to consider and pass upon an application of the plaintiff for a permit to erect a building or buildings on the tract of land situated at the corner of Brookline and Henry Streets in Cambridge; also to allow the plaintiff to erect any lawful building upon said tract of land regardless of the provisions of a certain ordinance of said city; and that said ordinance be held to be invalid in its specific application to the plaintiff's land.

The ordinance in question was passed on December 31, 1923, and approved by the Mayor on January 7, 1924. Later it was validated by chapter 87 of the Acts of 1925.

The provisions of the ordinance divided the city into three districts: residential, business, and unrestricted. The petitioner's land in question was placed in district R-3, in which are permitted to be erected dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses, and gardening, with customary incidental uses, including garage for not more than two cars. Four-story buildings or buildings 60 feet in height are permitted.

The following uses are expressly prohibited in said residential district: "Business and industry of all sorts. Buildings of five or more stories or over sixty feet in height." Buildings must be set back 5 feet and be at least 25 feet from the center of any street.

In August, 1924, under the provisions of chapter 40, section 27, of the General Laws, and chapter 133 of the Acts of 1924, the plaintiff petitioned the Board of Appeals to vary the application of said ordinance so as to permit the plaintiff to erect a business building on said locus, or, in other words, to take the locus in question out of the residential zone. After a hearing the Board refused to grant the petitioner's request.

The locus in question contains 29,000 square feet of land, and is part of a large tract containing 140,000 square feet of land which was also owned by the plaintiff at time of the passage of said ordinance.

The locus in question has always been used for residential purposes, and, at the time of the passage of the ordinance, there was a dwelling-house located thereon. Part of the remaining land of the plaintiff to the east of the locus had been occupied by a mansion-house, which has since been removed.

The locus is situated at the corner of Brookline and Henry Streets in Cambridge. It has a frontage on Brookline Street of 304.75 feet and on Henry Street, 100 feet. Directly across Brookline Street to the west and across Henry Street to the north is a thickly settled residential

district with but a small amount of land available for more residences. Diagonally across Brookline Street on the opposite corner from the locus is situated a city park containing 30,000 square feet of land. A short distance from the locus to the south is situated the river parkway, called "Memorial Drive," under the control of the Metropolitan District Commission.

This case came on to be heard before a single justice upon objections to the master's report. The Court ordered a decree to be entered overruling the objections and confirming the master's report, and reported the case for the determination of the Full Court.

This case came on to be heard before the Full Bench upon the report from the single justice. The Court ordered that the bill be dismissed.

Argument.

Upon the pleadings and master's report the plaintiff is not entitled to relief.

1. The master does not find any unreasonable or arbitrary use of power or abuse of discretion on the part of the City Council in passing the aforesaid zoning ordinance.

> *Reinman* v. *Little Rock*, 237 U.S. 171, at page 177: "While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the 14th Amendment."

In *Albion* v. *Toledo*, 124 N.E. 237, cited in 6 A.L.R. 426, at page 429, the Court says: "Unless there is a clear and palpable abuse of power the court will not substitute its judgment for legislative discretion. The local authorities acquainted with local conditions are presumed to know what the needs of the community demand. . . ."

"Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police regulation, and the courts can only interfere when such regulation arbitrarily exceeds a reasonable exercise of authority."

In *Jardine* v. *Pasadena*, 248 Pac. 225, cited in 48 A.L.R. 509, at page 515, the Court says: "Every intendment is to be indulged in and all doubts resolved in favor of the validity of its action. The legislative determination of the facts which warrant the action of the legislative body will not be set aside or disregarded by the court unless the legislative discretion is clearly and palpably wrong and such appears to be and is found to be the fact from the evidence educed from the trial court."

2. The ordinance will be sustained in its application to the plaintiff's land if it tends to promote the health, safety, convenience, and general welfare of the inhabitants.

(*a*) The master finds that the changing of the locus in question to a business zone would tend to increase to a small extent the amount of commercial traffic in Brookline Street (see section 54 of Master's Report), and, as traffic in this street will increase (see section 25 of Master's Report), this will tend to cause congestion, especially if Brookline Street is widened and used as an artery for traffic when the new Brookline Street bridge is built. If the placing of the plaintiff's land in R-3 district would tend to

relieve congestion of traffic in Brookline Street, this in itself would be sufficient justification for such zoning of the plaintiff's land.

Zahn and Ross v. *Board of Public Works for the City of Los Angeles*, 195 Cal. Rep. 497. In this case the Court said: "The requirements of a traffic boulevard are that traffic shall be kept moving, whereas it is common knowledge that on business streets traffic is retarded. This naturally arises from the necessity of stopping and parking on business streets."

Cusack Co. v. *City of Chicago*, 242 U.S. 526, at pages 530 and 531: "We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare."

3. The preservation of the residential district to the west and north of the locus from the intrusion of business uses and incongruous commercial buildings is sufficient justification for the placing of the plaintiff's land in a residential zone.

In *Miller* v. *Board of Public Works of the City of Los Angeles*, 195 Cal. Rep. 477, the Court says: "We think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be

vested upon the protection of the civic and social values of the American home, and the establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence of the nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influence are the very foundation of good citizenship and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but to the life of the nation as a whole."

While the above was spoken of the establishment of residential zones, it applies with equal force to the preserving of these zones once established.

(*a*) The intrusion of mercantile buildings into this residential district adjacent to the locus in question would tend to mar the beauty of the locality as a residential district, and the zoning of the plaintiff's land to prevent this, as auxiliary to other reasons, would be justification for such zoning.

Welch v. *Swasey*, 193 Mass. 364; 214 U.S. 91. 105, 106.

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In *Wulfsolin* v. *Burden*, ~~284~~ N.Y. 288; 43 A.L.R. 651, at page 659, the Court says: "With few exceptions courts have not been ready to say that they might be sustained merely because they preserved the esthetic appearance of a private residential district and prevented it from being blotched by the erection of some incongruous structure whereby the value of all neighboring property was impaired. The Supreme Court of the United States has, however, gone so far as to

approve in substance the views of the Massachusetts Supreme Court that esthetic considerations might be considered as auxiliary of what thus far have been regarded by the courts as more effective and sufficient reasons."

4. The action of the city government in placing the plaintiff's land in a residential district was a reasonable use of its discretion.

In *Stillman* v. *Lynch*, 192 Pac. 272; 12 A.L.R. 552, at page 561, the Court says: "Every doubt as to the constitutionality of a statute must first be resolved in favor of its validity and that before a statute can be declared invalid the repugnancy between the statute and the Constitution must be entirely clear. . . . Every presumption is in favor of the constitutionality of a statute, and in case of a doubt the statute must be held to be valid."

In the case of *Inspector of Buildings of Lowell* v. *Stoklosa*, 250 Mass. 52, at page 62, the Court makes the following quotation from *Dobbins* v. *Los Angeles*, 195 U.S. 223: "It may be admitted that every intendment is to be made in favor of the exercise of the lawfulness of municipal power, making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community."

It was necessary for the City Council to draw a line of demarcation between the thickly settled district lying to the west, northwest, and north of the plaintiff's land and

the mercantile district lying to the south, southeast, and east of the plaintiff's land.

Reinman v. *Little Rock*, 237 U.S. 171, *supra*.
Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365, 388.

It would appear reasonable that the City Council should draw this line through the plaintiff's land so as to preserve the residential character of Brookline Street north of the Ford factory and the residential character of Henry Street along the frontage of the locus upon said street.

In *Zahn and Ross* v. *Board of Public Works of the City of Los Angeles*, *supra*, the Court said: "The mere fact that outside of the . . . district there was other property similar in nature and character would not justify the court upon ascertaining that fact to substitute its judgment for the legislative judgment. The boundary line of a district must always be more or less arbitrary, for the property on one side of the line cannot in the nature of things be very different from that immediately on the other side of the locus."

The fact that the inclusion of the petitioner's property in R-3 district rather than in a business zone depreciates its value is not of controlling significance. Every exercise of the police power is apt to affect adversely the property interest of somebody.

Spector v. *Building Inspector of Milton*, 250 Mass. 63.

In *Kansas City* v. *Fred Liebi*, 252 S.W. 404, cited in 28 A.L.R. 295, 299, at page 300, the Court says: "Nor does the mere fact that the advantage of a public improvement also inures to a particular individual or group of individuals deprive it of its public character."

In *Miller et al.* v. *Board of Public Works of the City of Los Angeles*, 234 Pac. 381, the Court says: "Somewhere the line of demarcation must be drawn, and it is primarily the province of the municipal body to which the zoning function is committed to draw that line of demarcation, and it is neither the province nor the duty of the courts to interfere with the discretion with which such bodies are invested, in the absence of a clear showing of an abuse of that discretion. In short, as previously indicated, we are not permitted to substitute our judgment for the legislative judgment."

5. The plaintiff in this case has suffered no greater disadvantage than may be suffered by any person whose land is on the border line between a business and a residential district.

Although the master finds that the plaintiff's land is depreciated in value and unsuitable for residential purposes, such finding is based entirely upon the assumption that the locus can be considered only by itself. The fact, however, that the plaintiff owns a large tract of land to the east of and contiguous to the locus in question gives him greater opportunities for the development of the tract consistent with the ordinance. The petitioner, by his ownership and control of the land contiguous to the locus in question, can protect the locus from the encroachment of undesirable mercantile establishments.

Whereas, if the ordinance as applied to the plaintiff's land is nullified by the Court, the owners of residential property on Brookline Street and Henry Street opposite the plaintiff's land would have no means of protecting their property from damages caused by the erection of such commercial or manufacturing buildings as the plaintiff may see fit to construct.

Village of Euclid v. *Ambler Realty Co., supra.*

6. There is no finding by the master that the locus in question, taken with the adjoining land of the plaintiff, could not be used profitably for residential or other purposes.

Jardine v. *Pasadena,* 248 Pac. 225, cited in 48 A.L.R. 509, 513.

7. If relief is granted to the plaintiff under the facts found by the master, it would be difficult to deny relief to any person bordering on the line of demarcation between a business and residential district, as the same arguments which the plaintiff uses would be applicable to them, and, moreover, certain parts of the plaintiff's land are farther removed from the land now occupied by commercial buildings than are some of the residences on Brookline Street and Henry Street.

8. The plaintiff had a valid contract for the sale of this locus in question with the Pittsburgh Plate Glass Company, a financially responsible corporation (see Master's Report, section 26), and it has an adequate remedy at law for the failure of said company to carry out its contract.

9. In case Brookline Street is widened by the City of Cambridge under the power of eminent domain, and the depth of the plaintiff's land is decreased, the plaintiff has his remedy for such action as provided by statute.

10. The plaintiff has failed to show any specific violation of the Constitution of the United States or the State of Massachusetts. There is no violation of the 14th Amendment, either by deprivation of property without due process, or by denial to the plaintiff of equal protection of the law. In the case at bar, the ordinance of the City of Cambridge, later supplemented by statute, places this case in the category of "police powers." Since there has not been shown any abuse of discretion, or palpable wrong done, the question resolves itself to one of reasonableness. Accordingly, the Court should not substitute its opinion

as to wisdom or good policy for that of the Legislature or City Council.

Cusack Co. v. *City of Chicago*, 242 U.S. 526, 530, 531, *supra.*
Reinman v. *Little Rock*, 237 U.S. 171, 177, *supra.*

In *Welch* v. *Swasey*, 214 U.S. 91, 105, 106, the Court says: "This court, in cases of this kind, feels the greatest reluctance in interfering with the well considered judgment of the courts of a state, whose people are to be affected by the operation of the law. The highest court of the state in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature), and with the general situation surrounding the subject matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong."

In *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, at page 388, the Court says: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. . . ."

"Here the exclusion is in general terms of all industrial establishments. . . . But this is no more than happens in respect of many practice-forbidding laws which this court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. . . ."

"In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the prescribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason—assumes the character of a merely arbitrary fiat'. . . ."

"The great question involves the validity of zoning legislation . . . with residential districts . . . excluding stores, hotels, apartment houses, etc. . . . Decisions of state courts are numerous and conflicting but those which broadly sustain the power greatly outnumber those which deny altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. . . ."

The Court then cited *Aurora* v. *Burns*, 319 Ill. 84, 93: "If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."

Then the Court goes on to say that experts concur in this broader view; that it is easier to provide fire apparatus, increase safety of homes, reduce street accidents, decrease noise, etc.

". . . These reasons are sufficiently urgent to preclude us from saying, as it must be said before the

ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."

11. The respondents submit that the plaintiff, by the act of the City Council in placing the locus in question in the R-3 district, has not suffered any greater disadvantage than may be suffered by any person on the border line of two districts; that the ownership of the adjoining land gives him greater opportunity to minimize such disadvantages; that there is no evidence in this case which shows it was the intent of the City Council to persecute any one or to abuse the powers vested in it; and that the plaintiff is not entitled to the relief prayed for in his bill.

By their Attorneys,
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